UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOUNTAIRE FARMS OF DELMARVA, INC.

Employer

and

SILVIA ESTRADA

Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 27, AFL-CIO, CLC

Union

Case 5-RD-1264

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[1/]

3. The labor organization involved claims to represent certain employees of the Employer.[2/]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act:[3/]

> All production employees, including, but not limited to, line leaders, live hangers, pinners, eviscerating, grading, cut-up, sawing, deboning, tray pack, stretch bag, and other further processing employees, employed by the Employer at its poultry processing plant on the Delmarva Peninsula, but excluding all employees currently covered under contract between Mountaire and Delmarva and Local 355 of the Teamsters Union, and all office clericals, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An Election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 27, AFL-CIO, CLC

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.,* 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility,* 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by **February 1, 2001.**

Dated January 18, 2001

at Baltimore, Maryland

/s/Wayne R. Gold
Regional Director, Region 5

1/ Mountaire Farms of Delmarva, Inc. (the Employer) is a Delaware Corporation engaged in the operation of a poultry processing plant at its Selbyville, Delaware location. During the past 12 months, a representative period, the Employer sold and shipped products, goods and materials valued in excess of $50,000 directly from points outside the State of Delaware.

2/ The parties stipulated that United Food and Commercial Workers International Union, Local 27, AFL-CIO, CLC (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

3/

The Decertification Petition

An employee, Silvia Estrada (the Petitioner), filed the petition in this case on December 18, 2000, seeking a decertification election in the following recognized unit: All production employees including line (sic) hangers, pinners, eviscerating, grading, cut-up, sawing, deboning and other further processing employees; excluding all employees currently covered under contract between the Employer and Local 355 of the Teamster (sic) Union. There are approximately 940 employees in the bargaining unit at issue. As of the date of the hearing, approximately 117 employees, or 12.4% of the workforce, had been on the payroll for fewer than 90 days.

The Parties' Unit Positions

All parties agreed at the January 4, 2000 hearing that the appropriate unit should include line leaders and tray pack and stretch bag employees. The Employer and the Petitioner would also include all employees of the Employer with fewer than 91 calendar days of service (herein referred to as probationary employees). The Union would exclude all employees of the Employer with fewer than 91 calendar days of service. All parties agreed at the hearing that the appropriate unit should exclude employees employed by Able-Bodied Temporary Services, Inc., a temporary service agency utilized by the Employer.

The Contractual Recognition Clause

The parties stipulated that since at least 1978, the Union and the Employer have had a collective-bargaining relationship that has been embodied in a series of collective-bargaining agreements, the most recent of which is effective from December 22, 1997 through December 15, 2001. The parties stipulated that the extant collective-bargaining agreement does not serve as a contract bar to the processing of the decertification petition at issue. The extant contract, received in evidence as Employer's Exhibit 1, contains a recognition clause that provides as follows:

> The Employer recognizes the Union as the sole bargaining agency in the matter of wages, hours of work, and other conditions of employment, in the bargaining unit consisting of all regular employees now employed or who may be employed by the Employer at their poultry processing plant on the Delmarva Peninsula, as follows:
>
> All production employees including but not limited to the following: live hangers, pinners, eviscerating, grading, cut-up, sawing, deboning, and other further processing employees, but excluding all employees currently covered under contract between Mountaire of Delmarva and Local 355 of the Teamsters Union.

A new employee will become a regular employee after ninety (90) calendar days after the date of hire.

[Emphasis added].

The Issue

The sole issue in dispute is whether probationary employees (referred to herein as employees with fewer than 91 calendar days of service) are eligible to vote in the decertification election. The Union contends that the probationary employees are not eligible to vote because the recognized unit consists only of all "regular employees" as that term is defined by contract. The Employer contends that probationary employees are eligible to vote in the decertification election because the parties have treated them as covered by the recognized unit even though they are not entitled to certain contractual benefits until they become "regular employees."

The Witnesses at the Hearing

Two witnesses testified at the hearing, one for the Employer and one for the Union. The Petitioner provided no witnesses.

The Employer's witness, David C. Tanner, has been Director of Human Resources for the past two and one-half years. The record reflects that he has no personal knowledge of the bargaining history of contractual provisions, and he has not looked at bargaining notes or bargaining proposals from contract negotiations.

The Union's witness, Gerald Birl, has been service representative for Local 27 since 1982. Mr. Birl testified that UFCW, Local 27 was created as a result of a 1982 merger between Local 669 of the Retail Clerks and Local 117 of the Amalgamated Meat Cutters. Prior to that merger, Birl was president of the former Local 199 of the Meat Cutters Union, which merged with Local 117 of the Amalgamated Meat Cutters in 1979. Birl is Chairman of the Board of Trustees of the Delmarva/UFCW Health and Welfare Fund. Since 1971, Birl has been involved in the negotiation and administration of collective-bargaining agreements at the Selbyville plant, then owned by Mountaire's predecessor, H&H Poultry Company. Mountaire took over operation of the Selbyville plant about March of 1978. Birl negotiated and executed the extant collective-bargaining agreement.

The Employer's Operations

The Mountaire poultry processing plant in Selbyville, Delaware is a fairly large complex that consists primarily of one building that covers a square block. The Employer employs about 1600 employees at the Selbyville location. Mike Tirell is the Vice President of Operations. Mike Sebach is Director of Operations. The plant manager of the processing plant reports to Mr. Sebach. There are numerous departments at the facility. Subordinate supervisory personnel report to department heads of each department.

The Union, United Food and Commercial Workers Union, Local 27, represents approximately 940 bargaining unit employees engaged in the processing of poultry at the Selbyville plant. Teamsters, Local 355 represents approximately 300 employees in a separate bargaining unit under a separate collective-

bargaining agreement. The employees represented by Local 355 are engaged in the transportation and warehousing of the product.

The Employer operates three shifts: two staggered production shifts and a sanitation or clean-up shift. The Employer's production procedures involve a straight-line slaughter through final packaging to the ultimate consumer. Live birds are brought to the plant through the shipping dock and off-loaded onto a conveyor. Then the birds are hung on a shackle and sent through the kill line. Subsequently, they are washed, cooled, deboned, wrapped, labeled, boxed, and loaded on pallets for delivery to customers. Generally, employees represented by the Union report to work at about the time that the product arrives in their work area. They are paid hourly and punch a time clock.

The 90-Day Probationary Period

There is a 90-day probationary or trial period for new employees as set forth in the extant collective-bargaining agreement. Tanner estimated that one or two percent of probationary employees have been terminated prior to completion of their probationary period. Tanner testified that he thought that a supervisor evaluated employees three times during their probationary period. Regular employees are evaluated at least once a year after their probationary period. New employees receive personal protective equipment from the Employer when hired. Probationary employees do not wear any special uniforms or have any distinguishing characteristics to denote their probationary status. Tanner testified that new employees go through a four-hour orientation program before they start work in the plant. During this orientation process, they complete paperwork for health and welfare insurance that is sent to plan administrators.

Union Access to Employees and Union Representation of Employees

There is no union access provision in the collective-bargaining agreement. Tanner testified that the Employer has a good working relationship with the Union and has permitted a liberal access policy for Union representatives. Tanner testified that full-time Union representatives, primarily Gerald Birl or Roman Delgado, have visited the plant to administer the collective-bargaining agreement and have communicated with employees, including probationary employees, in the cafeteria. Birl testified that Union representatives post schedules when they plan to visit the plant so that any employee who wants to talk to them will have an opportunity to do so.

Tanner testified that all employees are eligible to participate in the contractual grievance procedure, irrespective of length of service. Tanner testified that he did not think that there had been a written grievance concerning the bargaining unit at issue since his tenure began. Rather, he testified that issues generally are resolved in face-to-face discussions between Union and Employer representatives. Tanner further testified that during his tenure, the Union has acted in a representative capacity for employees with fewer than 91 calendar days of service in informal-type grievance proceedings. He provided two examples involving unnamed probationary employees. In the first example, Tanner testified that Union representative Roman persuaded the HR Manager to give a second chance to a probationary employee who had been discharged for insubordination. In the second example, Tanner testified that he thought that Roman was involved in the reduction of a probationary employee's suspension from four days to two days. Tanner further testified that the Employer has never taken the position that the Union may not represent probationary employees in informal-type discussions with Employer representatives. The Union did not rebut this testimony.

Tanner testified that the Employer has had occasion to "rehire" former employees. When doing so, the Employer makes an ad-hoc or case-by-case determination of whether the rehired employee must go through another probationary period based on how long the former employee has been away. By way of example, Tanner testified that if an employee was dropped from payroll records because the employee did not report to work for several days, and then the employee presented a legitimate reason to the Employer for the absence, the employee might be reinstated without any additional probationary period. When asked whether the Union ever got involved in that process, Tanner responded, "Yes, I would say they do." When asked whether the Union ever requested that the Employer bridge the gap between the two employment periods, Tanner testified, "I believe that's happened." The Union did not rebut this testimony.

Union Security and Dues Checkoff

Article III of the collective-bargaining agreement contains a "UNION SECURITY AND CHECK-OFF" provision for "all employees of the Employer covered by the agreement." That provision provides in relevant part:

> 1. It shall be a condition of employment that all employees of the Employer covered by this agreement who are members of the Union in good standing on the execution date of this Agreement shall remain members in good standing, and those who are not members on the execution date of this Agreement shall, on or after the thirty-first day following the beginning of such employment, become and remain members in good standing in the Union.
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> 2. The Employer shall deduct periodic dues and initiation fees uniformly required as a condition of membership in the Union, and regularly authorized assessments on a weekly basis from the wages of each employee covered by this Agreement who has filed with the Employer a written assignment authorizing such deductions, which assignment shall not be irrevocable for a period of more than one year or beyond the termination date of this Agreement, whichever occurs sooner….

Tanner testified that new employees with fewer than 91 calendar days of employment are treated the same under the union security and checkoff provisions as other employees. The Union did not rebut this testimony. In fact, Birl conceded that the union security clause applies to all employees at Mountaire who work in job classifications represented by the Union. Birl testified that new employees become union members after 31 days of employment when they start paying union dues, and that probationary employees pay the same amount of dues and initiation fees as regular employees. Birl testified that employees who have had their employment terminated during the probationary period may apply for a refund of dues by contacting the Union office. Birl also testified that if a new employee left the company between the 31st and 90th day, the Union, upon application of the employee, would refund all initiation fees and dues.

Health and Welfare Contributions and Eligibility for Health and Welfare Benefits

Article XIII of the collective-bargaining agreement entitled "HEALTH & WELFARE FUND" provides, in relevant part, as follows:

> "1(a). The Employer agrees that payments to the Health and Welfare Fund for each employee covered by this Agreement, shall be on the following basis: six percent (6%) of all taxable income of all bargaining unit employees from their first day of employment."

[Emphasis added.] The Delmarva/UFCW Health and Welfare Fund is a self-funded multi-employer arrangement that is jointly administered by employer and union representatives. There are two union trustees and two management trustees. Birl testified that the current collective-bargaining agreement contains a mechanism to fund health and welfare benefits from employer contributions based on six percent of all taxable income of all bargaining unit employees from the first day of employment. Birl testified that the Fund uses Employer contributions from new hires, who may come and go, to provide funds for regular employees when they become eligible for health and welfare benefits. The record reflects that there is no segregation of Employer contributions made on behalf of probationary employees from Employer contributions made on behalf of regular employees. Employees make no contributions to the Fund.

Tanner testified that there are three health and welfare insurance plans that are made available to regular employees. Employees with fewer than 91 calendar days of service are not eligible to receive any health and welfare benefits. Tanner testified that all employees covered by the collective-bargaining agreement between the Employer and the Union become eligible for the first of three health and welfare plans after 90 days of employment. Employees become eligible for the first plan after 90 days of service. Employees become eligible for the second plan after one year of service. Employees become eligible for the third plan after two years of service. Tanner testified that eligibility requirements for participation in the health and welfare plans is set forth in plan documents. The collective-bargaining agreement does not specifically incorporate the health and welfare plans. Birl testified that the Board of Trustees of the Fund made the decision to provide different levels of benefits to participants in the plans based on their different levels of service. Tanner testified, and Birl confirmed, that a newly hired employee would have health and welfare contributions made on his behalf by the Employer starting from the new employee's first day of employment, even though the employee is not yet eligible to receive benefits under any plan.

Seniority

Tanner testified that the Employer furnishes the Union with seniority lists that contain an employee's name, social security number, and date of hire, and that such lists have included information about employees with fewer than 90 days of service. Union Exhibit 1 is an alphabetical listing, compiled by the Employer and given to the Union, of all employees working in the bargaining unit represented by Local 27. Union Exhibit 1 sets forth an employee's name, social security number, department, seniority date, and union code. It includes all employees who perform unit work, whether or not they have completed their 90-day probationary period and whether or not they have started to pay union dues. Union Exhibit 1 lists a January 2, 2001 seniority date for employee Jaclyn R. Mahan, i.e., two days before the hearing herein. Tanner testified that the Employer allows all employees in the unit to be represented by the Union, even if they have only been employed for one day. Tanner testified that seniority begins with an employee's date of hire.

Article VIII of the collective-bargaining agreement entitled "SENIORITY" provides, at Paragraph 6, as follows:

> "Beginners shall obtain seniority after ninety (90) days of continuous service. In case of layoffs, the Employer shall lay off such beginners before putting into effect, the seniority policy, as stated above. Beginners, after having fulfilled ninety (90) days continuous service, shall date their seniority from the date they were first employed. The Employer may lay off or discharge any beginner during his trial period, and such layoffs or discharge shall not be subject to arbitration."

[Emphasis added]. Tanner testified that when the Employer needs to lay off employees, it must lay off employees with fewer than 90 days of continuous service first. He further testified that probationary employees who are discharged are not allowed to grieve their discharge through arbitration. Article X of the collective-bargaining agreement governs "DISCHARGE." It provides that no regular employee who has completed his trial period shall be discharged except for just cause. Probationary employees are excluded from just cause protection.

Wages

Schedule A of the extant collective-bargaining agreement sets a graduated scale of contractual wage rates for employees with 90 days, six months, and one year of employment. The contractual wage rate for "Employees @ 90 days of employment" is $7.00 effective December 17, 2000, as set forth in Schedule A. Schedule A does not provide a wage rate for probationary employees. Tanner testified that there is a starting wage rate or base rate for newly hired employees that is below $7 per hour. This non-contractual base rate for new hires has existed throughout Tanner's two and one-half year tenure at the Employer. Tanner testified that he thinks that the starting rate of pay for new employees with fewer than 91 days of employment is $6.80 or approximately $0.20 less than the contractual wage rate for "Employees @ 90 days of employment." Tanner testified that he thought that the starting rate of pay for new employees has generally been increased when contractual wage rates are increased, but there could be occasions when this has not happened. Tanner testified that the Employer sets the starting wage rate for new hires based on such factors as the availability of labor and the unemployment rate in the geographic area where the plant is located. Tanner further testified that the Employer pays a non-contractual $100 hiring bonus to new hires, and a $100 bonus to existing employees who refer new hires.

Vacations

Tanner testified that all employees become eligible for vacation benefits after one year of service. He testified that vacation credit begins accruing on an employee's hire date. Article VI of the collective-bargaining agreement entitled "VACATIONS" provides, in relevant part, as follows:

> "1. Vacations with pay shall be granted to all regular employees in the Employer's employee, as follows:"

The vacation article then provides for between one week and five weeks of paid vacation depending on years of service. No employee, probationary or otherwise, is entitled to any vacation time prior to completing one year of service. Employees with the greatest seniority are given first choice in selecting their vacation periods.

Holiday Pay and Jury Duty Pay

The record establishes that probationary employees are not eligible for holiday or jury duty pay. Tanner testified that an employee must be employed at least 90 days prior to a holiday to be eligible for holiday pay. This testimony is consistent with Article VII of the collective-bargaining agreement governing "HOLIDAYS." Similarly, Tanner testified that probationary employees are not entitled to receive any compensation for jury duty. This testimony is consistent with Article XIX of the collective-bargaining agreement governing "JURY DUTY."

Bereavement Pay, Second-Shift Premium Pay, and Accident Pay

Tanner testified that bereavement pay applies to all employees from their first day of employment. This testimony is consistent with Article XVIII of the collective-bargaining agreement entitled "FUNERAL LEAVE PAY." Tanner also testified that the second shift is paid a $0.20 shift premium and that all employees on the second shift are entitled to this shift premium from their first day of employment. When asked on cross-examination whether a probationary employee who has been denied bereavement pay or a shift premium could arbitrate the matter, Tanner responded that he did not know because that issue has not arisen. Tanner testified that the Employer has always treated probationary employees the same as regular employee for certain purposes such as funeral leave, shift premium, and accident pay. The Union did not rebut this testimony.

The Union's Testimony About its Duty of Fair Representation

Birl testified that the Union does not "fully" represent probationary employees because they are not regular employees under the contract until they complete ninety days of employment. Birl explained that probationary employees have no seniority rights, can be terminated or laid off at will, and are not subject to the contractual wage schedule. Birl testified that most Local 27 collective-bargaining agreements that he is familiar with, like the extant collective-bargaining agreement between the Union and the Employer, preclude arbitration for probationary employees. Birl testified that the Union and its predecessors and the Employer and its predecessors historically have treated regular employees differently from probationary employees. On cross examination, Birl acknowledged that the length of service for regular employees may also determine varying levels of fringe benefits, such as the amount of vacation. Similarly, he acknowledged that the Union may negotiate different levels of pay and benefits among employees or classifications of employees in the bargaining unit.

CONCLUSION

I conclude that the probationary employees at issue (employees with fewer than 91 calendar days of service) are eligible to vote in the decertification election. I rely on the fact that the Employer and the Union have treated probationary employees as covered by the recognized contractual unit. I also rely on the express language of the contractual recognition clause that defines the bargaining unit as consisting of all regular employees now employed or who may be employed by the Employer.

The record establishes that the parties to the contract have treated probationary employees as covered by the recognized unit. Probationary employees work in the same job classifications as regular employees represented by the Union. The Union has presented grievances on their behalf. The Union has acted in a representative capacity for probationary employees in informal-type grievance discussions with Employer representatives concerning suspension or discharge. Union representatives have visited the

plant to administer the collective-bargaining agreement and have communicated with probationary employees about workplace issues. Probationary employees are included on seniority lists that have been given by the Employer to the Union. Probationary employees are given contractual seniority credit for service during their probationary period. The seniority list in evidence confirms that seniority is recorded from an employee's first day of employment. The union security clause applies to probationary employees. The record establishes that probationary employees are treated the same under the union security clause as other employees. The Employer makes contractual health and welfare contributions on behalf of probationary employees starting from their first day of employment. The record establishes that the Employer has always treated probationary employees the same as regular employees for purposes of funeral leave, shift premium, and accident pay under the contract. I conclude that this conduct by the parties to the contract demonstrates an intent to include probationary employees in the recognized contractual unit.

I also find that the language of the contractual recognition provision is consistent with an intent to include probationary employees in the recognized contractual unit. The contractual recognition provision defines the recognized bargaining unit as consisting of all regular employees now employed or who may be employed by the Employer. It further provides that a new employee will become a regular employee after (90) calendar days after the date of hire. Reading these two clauses together, particularly in light of the conduct of the parties to the contract, I find that probationary employees are covered by the express language of the contractual recognition clause. That is, after 90 calendar days after hire, probationary employees may be employed by the Employer as regular employees. There is nothing in this language to suggest the exclusion of probationary employees. Moreover, the collective-bargaining agreement defines conditions of employment for probationary employees. It logically follows that by entering such an agreement, the Employer and Union, at least implicitly, agreed that probationary employees were included in the bargaining unit represented by the Union. See NLRB v. Hollaender Mfg. Co., 942 F. 2d 321, 326-327 (6th Cir. 1991).

In sum, the record establishes that the Union and the Employer have treated the probationary employees at issue as included in the recognized contractual unit. Probationary employees have been represented by the Union. The Union has presented grievances on their behalf. Probationary employees are included on seniority lists and accorded contractual seniority credit for their trial period. The contractual union security clause applies to them. Contractual health and welfare contributions are made on their behalf. The collective bargaining agreement defines their conditions of employment. Furthermore, the express language of the contractual recognition provision defines regular employees as including those who may be employed by the Employer after 90 calendar days following hire. In these circumstances, I conclude that the recognized contractual unit includes employees who have fewer than 91 calendar days of employment and that such probationary employees are eligible to vote in the decertification election.

Based on all of the foregoing, I shall direct an election among the employees in the following unit:

> All production employees, including, but not limited to, line leaders, live hangers, pinners, eviscerating, grading, cut-up, sawing, deboning, tray pack, stretch bag, and other further processing employees, employed by the Employer at its poultry processing plant on the Delmarva Peninsula, but excluding all employees currently covered under contract between Mountaire and Delmarva and Local 355 of the Teamsters Union, and all office clericals, guards, and supervisors as defined in the Act.

355-3300-3301; 362-6700-6701; 362-3381-5000